

Commissions of Investigation and Procedural Fairness

A Review from a legal perspective
of the
Commissions of Investigation Act 2004
and of the
Report into the Catholic Archdiocese of Dublin
(the “Murphy Report”)
forwarded to the Minister on 21 July 2009
and released on 26 November 2009

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Note on the genesis of this document

When the Report of the “Murphy Commission” was released on 26th November 2009 it received exhaustive coverage and commentary in the media. Commendation for the work of the Commission was almost universal.

However, in light of some emerging concerns, the Association of Catholic Priests (ACP) in Ireland decided on a “post-match” review of Commissions of Investigation in general and the Murphy Commission in particular and requested Fergal Sweeney, an Irish barrister who has also served as a judge for many years in Hong Kong to undertake this review from a purely legal perspective.

This review is not intended to take away from the vast and valuable work accomplished by the Murphy Commission. It does not aim in any way to draw attention from the injustice and suffering of those who were abused by clerics in positions of trust, which gross injustice was aggravated by the many failures in addressing complaints brought to Church and State Authorities. It does not seek to absolve the failures of those in positions of authority in Church and State.

Rather, this review wishes to address certain areas of concern relating to statutory investigations under the Commissions of Investigation Act 2004 as a matter of natural and Constitutional justice.

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Executive Summary

"If a criminal prosecution is not practicable, it is unlikely that the same objective can be achieved under the guise of an inquiry, by "naming and shaming" the culprit. To attempt this would be to try to fit a square peg into a round hole"

(Law Reform Commission,
Consultation Paper on Public Inquiries Including Tribunals of Inquiry, 2003)

1 Background to the Commissions of Investigation Act. 2004

- 1.1 Under our Constitution Courts of Justice provide for the administration of justice in public, with appropriate constitutional and legal protection for the various parties to the action, and with power to impose penalties.

Since the foundation of the Irish independent State there has been a long tradition of Tribunals of Inquiry that were set up by politicians to investigate matters of serious public concern and report back to the Dáil with their findings. Such Tribunals have no power to impose penalties other than a limited discretion to award or refuse costs to a witness.

- 1.2 Because the findings of a Tribunal can cause devastating reputational damage to witnesses and/or persons whose activities are being investigated, (sometimes in private and without their knowledge), there have been many constitutional challenges to Tribunals in the Irish Courts with consequential delay and legal expense.
- 1.3 Because of growing concerns regarding the Tribunals, in terms of cost and delays, the Law Reform Commission prepared a paper on the topic in 2003 in which they recommended *"that legislation be enacted providing for a private, low-key inquiry which focuses on the wrong or malfunction in the system and not the wrongdoer. The Commission expects that such an inquiry would not attract the rules of constitutional justice"*.
- 1.4 Following subsequent Dáil debates in which the pitfalls of the proposed legislation were highlighted by some opposition deputies (yet ultimately ignored), the **Commissions of Investigation Act 2004** was enacted to enable purely fact finding investigations into matters of serious public concern to then report back to the Dáil promptly and within budget. It was intended that they would become a "lawyer free zone" where facts could be established without the need for cross-examination or comment.

- 1.5 It was anticipated that Commissions of Investigation would be set up to inquire into systemic and institutional failures so that lessons could be learnt for the future. As they were not intended to judge or assess individual behaviour they did not have the same constitutional and legal protections for individual participants as are provided in the traditional Courts system.
- 1.6 Commissions of Investigation nonetheless still share with Tribunals the ability to cause serious reputational damage to individuals should a Commission go beyond examining institutional responses and proceed to assess, to “name, blame and shame” individuals for their role in any such failure of institutional response.
- 1.7 To avoid such risks and preserve the citizen’s constitutional protections the Irish Supreme Court had previously established four “minimum rights” that an individual is entitled to avail of before his/her good name is put in jeopardy. None of these minimum rights are catered for in the 2004 Act, which was designed to by-pass such hurdles by focusing on institutional responses rather than the role of any individual.

2. The Dublin Archdiocese Commission of Investigation (The Murphy Report, 2009)

- 2.1 The Dublin Archdiocese Commission of Investigation (the “Murphy Commission”) was established in 2006 under the Commissions of Investigation Act, 2004. The Dáil empowered the Murphy Commission to investigate the institutional responses of Church and State authorities, and *“to report on the handling by Church and State authorities of a representative sample of allegations and suspicions of child sexual abuse against clerics operating under the aegis of the Archdiocese of Dublin over the period 1975 to 2004”* (Murphy Report, Par. 1.1).
- 2.2 This Review of the Commission of Investigation Act, 2004 in relation to the work and Report of the Murphy Commission accepts and acknowledges that grave injustice and suffering were inflicted on young people and their families by the sexual abuse of children perpetrated by clerics in positions of trust, operating under the aegis of the Archdiocese of Dublin. This Review also acknowledges that the failure by the diocese to respond in a timely or effective manner to allegations of such abuse aggravated the wrongdoing and extended the injustice and the suffering of innocent children.
- 2.3 This Review examines the operation of the Murphy Commission under the Commissions of Investigation Act 2004. It does not seek to absolve the failure of those in positions of authority in Church and State. Rather, this review wishes to address certain areas of concern relating to the work of the Commission as a matter of natural and constitutional justice. In doing so, this Review acknowledges the vast amount of very valuable work done by the Murphy Commission.
- 2.4 This Review is precluded from using any of the evidence, affidavits or submissions put to the Commission, and from using any of the drafts of the final report, due to a 30-year embargo on publication (2004 Act, Sections 11, 41, 50), with severe penalties for breaching these “secrecy provisions”.

- 2.5 The Murphy Report at para 1.6 sets out its understanding that it “It was not the function of the Commission to establish whether or not child sexual abuse actually took place but rather to record the manner in which complaints were dealt with by Church and State authorities”.
- 2.7. The Murphy Report at para.1.7 made clear it was aware of the limits of its mandate: “This Commission’s investigation is concerned only with the institutional response to complaints, suspicions and knowledge of child sexual abuse”.

3. Examining the Murphy Report in light of the Commission of Investigation Act, 2004

- 3.1 In the course of its investigation the Murphy Commission in my opinion went well beyond its mandate in respect of one category of witness by building up and making a “case” (called “the Commission’s Assessment”) against individual clerics who testified before the Commission, instead of being “concerned only with the institutional response to complaints, suspicions and knowledge of child sexual abuse” (Report, Par. 1.7).
- 3.2. In thus extending its task, well accepted minimum rights of natural and constitutional justice were not observed and an individual’s constitutional right to his good name was not protected in the course of the Commission’s work.
- 3.3 As one examines the Report, standards of proof were not always respected by the Commission which resolved all or any differences of recollection against individual clerics without stated reasons.
- 3.4 The Report dismisses out of hand any reasons, explanations or mitigating circumstances put forward by those clerics whom it “names and shames”.
- 3.5. Indeed, in its Report the Commission only refers to such arguments and submissions as were made by the clerics who testified in order to try to dismantle them.
- 3.6 The Commission’s mandate was to report on the handling by Church and State authorities of a representative sample of allegations and suspicions of child sexual abuse against clerics operating under the aegis of the Archdiocese of Dublin. When the Report is critical of the handling by State authorities, in only one or two cases is the individual employee named. When it is critical of the handling by Church authorities, in every case is the individual named. No reason or explanation is given for this disparity of treatment.
- 3.7 There was an important recommendation in the LRC consultation paper that parties at risk of reputational damage who disputed a point of evidence and/or its interpretation should have their submissions, including any disagreements with the Commission’s conclusions, recorded in the Commission’s Final Report. I am aware that lawyers for clerical witnesses did submit alternative interpretations of evidence to the Commission, indeed I have had an opportunity to read some of them. Remarkably, none of them surfaced in the Final report.

- 3.8 It is submitted that badly worded phrasing in the Report (1.24) could have given rise to an incorrect interpretation that the vast majority of priests of the Archdiocese of Dublin were aware of abuse and “simply chose to turn a blind eye”. This has had serious consequences for priests of the diocese who were wholly innocent of such knowledge or behaviour.
- 3.9 The Report fails spectacularly to recognise the “learning curve” in the case of those in authority in the diocese, while recognising the importance of that learning curve in the case of all other category of witness or relevant authority.
- 3.10 The Report fails to acknowledge the specific context of the mission of the church with its pastoral approach to sin and forgiveness.
- 3.11 It is at times when the public is most agitated by the perceived wrongdoings of one sector of society that any statutory investigation has to be seen to carry out its work in an impartial and dispassionate manner.
- 3.12 It is difficult to avoid the conclusion that the practices and procedures of the Murphy Commission departed far from the remit given to it under the terms of the Commission of Investigation Act, 2004, and in carrying out its duties it fell far short of meeting the concerns of the Law Reform Commission (2003, 2005) and, more importantly, of natural and Constitutional justice.

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N.B.: In this document, the acronym “CSA” means *Child Sexual Abuse*

Chapter 1

Background to the Commissions of Investigation Act 2004

Reasons for establishing Commissions
The Abbeylara Case
Law Reform Commission Recommendations 2003
How were these LRC Recommendations implemented?
Report of Law Reform Commission 2005

Reasons for establishing Commissions:

Irish politicians in recent decades have attempted to placate general unease on matters of serious public concern by promising “a sworn public inquiry to be chaired by a judge” to investigate the issues and make a report on its findings. However, the process surrounding the establishment of Tribunals in Ireland has been random and haphazard, depending on political expediency more than inherent necessity or utility. These Tribunals of Inquiry lacked forensic focus, usually having very broad terms of reference that encouraged evidence-gathering that rippled outwards as one trail lead to another. Another unwelcome feature was the number of times that hearings ground to a halt as lawyers for participants/witnesses, and even the government itself, felt a need to seek judicial review of Tribunal procedures in the High and Supreme Court. To many observers it must have seemed that witnesses with deep pockets were rushing off to Court at every opportunity in order to delay or avoid having to testify before such Tribunals.

In fact, our legal system, more accustomed to trial by the well-established rules and procedures of the civil or criminal law, was in the process of adjusting to a new landscape whose rules and procedures were evolving literally, by trial and error. In a series of well-known judgements, some of which are referred to below, the High Court set out a stringent form of procedure that must be adhered to whenever a Tribunal threatens to infringe a participant’s constitutional right to vindication of their good name. These rulings were but a vindication of **Article 40, 3.2** of our Constitution:

“The state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”.

Gradually it dawned on many politicians that these Tribunals, set up to investigate scandal, had themselves become a source of scandal to the public because the large number of participants who felt obliged to mount legal challenges to protect their constitutional rights were causing Tribunal cost and time-frames to billow out of control.

The Abbeylara Case:

Meanwhile, the Dáil’s own attempts to have select committees of parliamentarians conduct inquiries into matters of serious public concern were floundering on the same

constitutional rock. As a result of the tragic death of a citizen during a Garda operation at **Abbeylara** in April 2000 both the victim's family and the Gardaí expressed a preference for an independent Tribunal of Inquiry. However the Dáil sought to conduct its own inquiry before a sub-committee of 7 politicians. This committee claimed it had "inherent" power to make findings of fact, including findings adverse to a person and capable of impugning his or her good name. Members of the Gardaí who were due to be summoned before the Committee went to the High Court where, after a full hearing before a Divisional Court of 3 judges, the Court found against the Dáil committee. (*Maquire and Others –v- Ardagh and Others* 23/11/2001)

On appeal a majority of the Supreme Court agreed with the Divisional Court on two constitutional grounds:

- a) that the Committee's conclusions would be "adjudicatory", that is they would reach a finding which, although not an administration of justice, still made an impact on an individual's right to his good name, and,
- b) that the targets of this investigation by politicians was not fellow politicians, Ministers or holders of any other constitutional office, but ordinary citizens, albeit public servants.

Fresh ideas were sought and, amongst a flurry of articles, submissions and seminar papers, the highly-influential Law Reform Commission (the "LRC") carried out extensive research on this topic before producing its Consultation Paper on "Public Inquiries Including Tribunals of Inquiry" in March 2003.

This was to be the foundation stone for the 2004 Act.

The Law Reform Commission Consultation Paper Recommendations 2003

The LRC paper expressed its view (para.1 of its Introduction) that the Irish Courts had granted to Tribunals of Inquiry "*a very extravagant measure of constitutional justice*" but stated that this may have resulted "*from the fact that inquiries have sometimes been forced to go beyond what we consider should be their primary task of discovering what happened and why, and into the role of assigning blame, which may be best left to a criminal trial*".

Indeed, at chapter 1.12 of its paper the LRC re-iterated this viewpoint:

..... "*If a criminal prosecution is impractical it is **unlikely that the same objective can be achieved under the guise of an inquiry, by 'naming and shaming' the culprit.** To attempt this would be to try to fit a square peg into a round hole. At a very broad level it may be said that the fear that such a process is occurring, whether designedly or not, even in a minority of cases, may underline the intense application*

by the Courts of the rules of constitutional justice to inquiries. The Commission would counsel against such substitution and urge that where criminality is suspected, a greater attempt should be made to bring criminal proceedings rather than hoping that the same objective can be achieved in the guise of an inquiry". (Emphasis added)

The LRC then went on to dissect the advantages and disadvantages of Tribunals of Inquiry. It says at paragraph 1.32 *"Some of the criticisms made of public inquiries may be crystallised in the statement that an inquiry has the potential to do immense damage to an individual's reputation".* Various models for an inquiry from many Common Law jurisdictions were examined in their report before the LRC turned to "Alternatives to Public Inquiries" at Chapters 10.06/07 of its Consultation paper:

"The Commission focuses generally on certain aspects of the problem in order to discern the sort of qualities which a new model should have. As will be seen, our conclusion broadly supports the design which is anticipated from the Minister for Justice. Put simply, the central problem addressed in this Paper is how best, subject to fair procedures, to minimise the need for constitutional justice. The best way of doing this is to ensure that the inquiry has one or more of the following characteristics:

- i) It would be held in private (though the report emanating from the inquiry would be published). The obvious advantage of this is that accusations against a person, made by possibly prejudiced witnesses and often amplified by the mass media, are not bruited forth to the world immediately. At most, if the inquiry finds the accusations to be substantiated, a version of them will appear in the final report, together with the inquiries measured judgment.*
- ii) Where appropriate, **the inquiry would emphasise the flaw or malfunctioning of the institution**, big business or profession involved, **rather than the sins of the individual wrongdoer**..... In assessing this point, we would refer to the point emphasised in paragraphs 7.19 and 7.30 that **a right to constitutional justice depends on the party being in the position of "an accused"**.*
- iii) As well as the conclusions, where a point is disputed the report would include comments on, or even disagreements with those conclusions by any person whose good name or conduct they call into question. **Thus, each side of the argument is recorded.**" (Emphasis added)*

The LRC paper then quoted a passage from the High Court case of *Stokes –V- Minister for Public Enterprise* (Kelly J.) of July 3rd 2000, where the applicant, the widow of a pilot involved in an accident, contended that as a matter of constitutional justice she had a right to see all records pertaining to the statutory investigation of that accident. This contention was rejected by the High Court on the basis that:

".....the object sought to be achieved by this report is the improvement of air safety and the prevention of future accidents and incidents. Not merely do the Regulations

require that the investigation and the report which derives from it is not concerned with apportioning blame or liability but the draft report does not attempt to do so.”

This is precise authority for the proposition that where there is no individual blame to be apportioned the rules of constitutional justice are not attracted, a view which is also advanced in a more general form at paragraphs 10.15-10.16 of the recommendations of the LRC:

*“.....Accordingly, the Commission recommends that legislation be enacted providing for a private, low-key inquiry **which focuses on the wrong or malfunction in the system and not the wrong-doer**. The Commission expects that such an inquiry would not attract the rules of constitutional justice”. (Emphasis added)*

How were these LRC recommendations implemented? And what was the intention of the legislature?

Extracts from the Dáil debates on the new Act:

The then **Minister for Justice, Mr. Michael McDowell** introduced a new model, “The Commissions of Investigation Act” to the Dáil at its Second Stage reading on 4th March 2004 as “*a credible alternative to the current tribunals.....which, in many people’s eyes, have become an inadequate vehicle or channel for dealing with matters of major public concern and which are now to be addressed by this legislation*”.

Further into his speech **Mr McDowell** stated:

*“On the wider point of what a tribunal can be expected to achieve that the commission has been unable to do, I suggest I have already answered that. **A commission is required to establish facts and may comment beyond that only to the limited extent that I have referred to earlier**. This limited brief is required if we are to have a mechanism that reduces the adversarial content of existing fora and places less reliance on cross-examinations and other features that add to cost and delay. A tribunal hears arguments in public and, unlike what we generally expect to be the case with commissions, permits cross-examination. It can then come to conclusions based on the balance of the evidence available to it. In other words, it is able to make judgements about the balance of evidence in a way that we do not foresee for commissions of investigation.” (emphasis added)*

Mr. J. O’Keeffe: (Opposition Deputy) *I accept that the Minister was faced with a dilemma. He is walking a constitutional tightrope. He wants to establish private inquiries without lawyers or publicity but there are constitutional constraints. We must ask if the Bill strikes the right balance. Article 40.3.2° of the Constitution grants each person the right to a good name and the protection of this right before the courts necessitates the right of representation, particularly where one’s good name may be called into question. As the tribunal system and the proposed commission*

system is, despite the best efforts of the Minister, somewhat adversarial in nature, questions are asked and answers given that often attribute responsibility to someone else. If, in a private hearing, a person is not aware of the adverse comments through a denial of representation, are his or her constitutional rights being violated? We must consider these issues now before the Bill is enacted.

The right to one's good name and the right to representation are so strong that any effort to restrain these rights, as the Bill proposes, raises the possibility of legal challenge. The Supreme Court highlighted the entitlement of a witness to cross-examine in the Jock Haughey case. In a more recent High Court case involving Dr. Kirrane and the Finlay tribunal, the court quashed much of the tribunal's report that connected Dr. Kirrane with the contamination of blood products. This order was made on the basis of natural justice and that his rights had been breached by the tribunal as he had not been afforded the right to representation, to cross-examine or to make submissions.

The Bill provides in certain circumstances for rights of attendance, representation and cross-examination. Has it done enough to avoid any potential infringement of constitutional rights? On the other hand, the workings of the commission seem, in certain circumstances, to veer towards the procedures that would be expected in a tribunal or a court. As we read the Bill, the distinction between a commission and a tribunal fades. Has the requirement of natural justice defeated the intention to have low-key, private, low-cost hearings? Has the Minister achieved his aim of private, swift inquiries without lawyers and without being bound to the rules of constitutional justice as suggested by the Law Reform Commission? If not we are simply adding another layer to the tribunal process which will be as costly and lengthy as what has gone before.

During the course of his contribution then Opposition **Deputy Joe Costello** said:

"The other reasons have to do with the limited status that a commission would have vis-à-vis a tribunal of inquiry. Precisely because it attempts, as much as possible, to be a lawyer-free zone, a more relaxed attitude is taken in this Bill to the rules of natural justice that were spelt out so comprehensively, if not dogmatically, by the Supreme Court in the Haughey case to which Deputy Jim O'Keeffe referred. However, that relaxed approach to investigation has an impact on the nature and potential content of any report that could be published by a commission".

Mr. Costello continued:

"The primary function of a commission will be to establish the facts of a matter.

*As the explanatory memorandum points out, "**Reports will set out the facts that have been established**" but "**it is not the function of a Commission to adjudicate where there is a conflict or incomplete evidence.**" Fact finding, therefore, if a conflict of evidence arises, will be outside the remit of a commission of investigation. This is presumably because the testing of conflicting accounts must involve due notice to the*

*individuals likely to be adversely affected and **the examination and cross-examination of witnesses**, all areas where it is simply impossible to exclude legal participation.” (emphasis added)*

On the 19th March 2004 **Mr.Costello** proposed several amendments to Section 11 with the comments:

“The points Deputy O’Keeffe and I are presenting here are fairly important. It is not good enough for the section to state that the Commission will adhere to “fair procedures”, as is stated at the top of the page. One must also incorporate them into the legislation. All that is allowed a person under subsection (3) is an opportunity to comment “by written or oral submission on the evidence”.

In his response on behalf of the Minister **Mr.M.Smith** replied, inter alia;

“I am satisfied that Section 11 strikes the right balance between ensuring confidentiality about sources and the need to allow named persons to protect their name and reputation. I therefore do not propose to accept the amendments.”

Mr.Costello:

The source of the information is one matter, but what of the right to cross-examine? The rights that are being given in the Bill to the person in question are rights to comment, particularly in subsection (3) where an “opportunity” to comment is being given. It is almost as though it is a privilege to comment by written or oral submissions on the evidence, but there is no right given to ask questions, to cross-examine or to come up with contrary evidence. It must stand up to constitutional scrutiny. The Minister stated he is providing for fair procedures but they may not be fair enough.

Mr.M.Smith (in reply):

The Deputy will be aware that fair procedures are written into all such provisions. The thrust of the change is to avoid costs associated with legal representation, cross-examination and so on. We are seeking a better, safer and secure way of doing difficult business.”

Within a few months the “Commission of Investigations Act” 2004 had been passed into law. Taking its cue from Mr.Smith’s contribution to the Debate, it contains the words “**in the interests of fair procedures**” in at least 6 of the sub-sections dealing with the conduct of investigations. As if such words, sprinkled like fairy dust through the Act, would guarantee the integrity of whatever measure was to follow.

Confirmatory Report of Law Reform Commission 2005.

The LRC followed up its Consultation Paper with a “Report into Public Inquiries Including Tribunals of Inquiry”, dated May 2005. In its Introduction the LRC welcomed the new legislation:

*“The Consultation Paper also recommended the enactment of legislation providing for a private low-key inquiry which would **focus on the wrong or malfunction in the system rather than on individual wrongdoers** and which would operate as a preliminary to, or in many cases an alternative to, a full scale tribunal of inquiry. The essential elements of this recommendation were implemented in the form of the commissions of investigation model of public inquiry, introduced into Irish Law by the “Commissions of Investigation Act 2004” (“the 2004 Act”). (Emphasis added).*

In a remarkably prescient comment, applicable also to Commissions of Investigation, the LRC made it clear that Tribunals have a limited role to play in our legal system:

2.19 *“Because Tribunals are established to inquire into what the 1921 Act refers to as matters of urgent public importance there may in many cases be a strong desire on the part of both those establishing public inquiries and the public for **inquiries to establish liability and to punish individuals**. This desire is particularly strong where the matter under investigation is a high profile or controversial occurrence. While this desire is understandable, **it is not a legitimate function of public inquiries, which should not be used as surrogates for the criminal or civil justice processes**. Tribunals are designed to investigate facts and make recommendations to prevent re-occurrence, **not to establish liability or punish people**.” (Emphasis added)*

Chapter 2

The Work of the Dublin Archdiocese Commission of Investigation

Preliminary

Terms of Reference

How did the Commission approach its task?

Were catholic clerics mere witnesses before the Commission?

How are “minimum rights” protected?

Preliminary:

One of the first inquiries under this new model tribunal was “**The Dublin Archdiocese Commission of Investigation**” into the response of Church and State authorities to a representative sample of complaints and suspicions of child sexual abuse by priests in the Archdiocese of Dublin between the years 1975 and 2004. It was chaired by Judge Yvonne Murphy with the assistance of 2 panel members, and became known as the “Murphy Commission”.

This Commission was appointed by Mr Michael McDowell, Minister for Justice, Equality and Law Reform, on 28th March 2006 and it started taking evidence soon afterwards. Its eventual Report, in two parts totalling 814 pages, was forwarded to the Minister by the Commission on the 21st July 2009 and was made public in November 2009 and became known as the “Murphy Report”.

In preparing this assessment of the Commission’s work within the context of the 2004 Act I bear in mind that the real victims of child sexual abuse were the children concerned and that the greatest crime was the betrayal and breach of trust perpetrated by their clerical abusers.

Further, that Church authorities in general before the implementation of the “Framework Document” in January 1996 seem to have paid more attention to the welfare of their accused priests than to that of their victims, that known paedophile priests were in fact moved to different parishes after being given the “all clear” by the psychiatrists to whom church authorities had sent them for treatment, and that a priority seems to have been given to the avoidance of scandal in the Church.

As a result of the Catholic Church’s failure to respond effectively to this developing crisis, priests and bishops have in many instances lost the previously unwavering trust of their followers, perhaps never to return. Any cleric brave enough to have suggested at the time of publication that some of them did not get a fair hearing in the investigation that led up to the preparation of the Murphy Report might well have been shouted down, such was the temperature at the time.

Now that a number of years have elapsed it is possible to reconsider how the Murphy Commission fulfilled its statutory role in their Dublin investigation. For it is at times when the public is most agitated by the perceived wrongdoings of one sector of society that any statutory investigation has to be seen to carry out its work in a calm, impartial and dispassionate manner.

The Terms of Reference:

What exactly was the Murphy Commission investigating?

- i) The institutional response of the Church and public and State authorities to such allegations and suspicions against priests,
or
- ii) Naming and blaming those individual clergymen perceived by the Commission to be personally responsible for any shortcomings in that institutional response of the Catholic Church?

The **terms of reference** of the Commission [see Murphy Report 2.2] as settled by the Minister for Justice, Equality and Law Reform on the 28th March 2006 were carefully drafted to enable the Commission to stay within the parameters of ***“a private low-key inquiry which focuses on the wrong or malfunction in the system and not the wrongdoer”*** as originally envisioned by the LRC.

They empowered the Commission to:

- “ (a) *select a representative sample of complaints or allegations of child sexual abuse made to the archdiocesan and other Catholic Church authorities and public and State authorities in the period 1 January 1975 to 1 May 2004 against Catholic clergy operating under the aegis of the Catholic archdiocese of Dublin;*
- (b) *examine and report on the nature of the response to those sample complaints or allegations on the part of the authorities to which those sample complaints or allegations were reported, including whether there is any evidence of attempts on the part of those authorities to obstruct, prevent or interfere with the proper investigation of such complaints;*
- (c) *in the case of complaints or allegations being examined, examine and report also on the nature of the response to any other complaints or allegations made by the complainant or against the person in respect of whom those complaints or allegations were made, including any such complaints or allegations made before 1 January 1975;*
- (d) *select a representative sample of cases where the archdiocesan and other Catholic Church and public and State authorities had in the period 1 January 1975 to 1 May 2004 knowledge of or strong and clear suspicion of or reasonable concern regarding sexual abuse involving Catholic clergy operating under the aegis of the Catholic archdiocese of Dublin;*

- (e) *establish the response of the archdiocesan and other Catholic Church and public and State authorities to those sample cases;*
- (f) *establish the levels of communication that prevailed between the archdiocesan and other Catholic Church authorities and public and State authorities with regard to those sample complaints, allegations, knowledge, reasonable concern or strong and clear suspicion;*
- (g) *examine, following a notification from the Minister for Health and Children that a Catholic diocese in the State may not have established the structures or may not be operating satisfactorily the procedures set out in the Report of the Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse by Priests and Religious, Child Sexual Abuse: Framework for a Church Response (1996) and any subsequent similar document, the position in that diocese;*
- (h) *examine, following a notification from the Minister for Health and Children that a Catholic diocese in the State may not be implementing satisfactorily the recommendations of the Ferns Report delivered to the Minister for Health and Children on 25 October, 2005, the position in that diocese; and make a report on these matters considered by the Government to be of significant public concern."*

As we have seen, this Commission derived its statutory authority from the *Commission of Investigations Act 2004*. Section 5 specifies that all Commissions of Investigation must operate under a precise description of their terms of reference:

"which must set out as clearly and accurately as possible, the events, activities, circumstances, systems, practices or procedures to be investigated together with the relevant dates, locations and individuals involved with a view to ensuring that the scope of any such investigation is described precisely".

However, "all Tribunals or Commissions are entitled to interpret their own terms of reference" (see *Haughey –v- Moriarty* (1993) 3 I.R. 1). Accordingly, The Murphy Commission at para. 2.8 of their Report stated how it interpreted its terms of reference:

"The Commission took the view that its task was as follows:

To ascertain the full extent of complaints or allegations of child sexual abuse made to the Archdiocesan and other Catholic Church authorities and public and State authorities in the period 1 January 1975 to 1 May 2004 against Catholic clergy operating under the aegis of the Catholic Archdiocese of Dublin.

To ascertain all of the cases during the relevant period in which the Archdiocesan and other Church authorities and/or public and State authorities:

- * knew of sexual abuse involving Catholic clergy:*
- * had strong and clear suspicion of sexual abuse; or*
- * had reasonable concern.*

Ancillary to its primary tasks set out above, the Commission was mandated to establish the levels of communication that prevailed between all relevant authorities relating to the sample complaints or allegations of child sexual abuse, incidents of known abuse, incidents of strong and clear suspicion of sexual abuse and incidents giving rise to reasonable concern that there may have been sexual abuse.

Having ascertained the full extent of such complaints and allegations, knowledge, suspicions or concerns of child sexual abuse, to select a representative sample of same for the purpose of examining them in detail in order to report on the nature of the response to those complaints and allegations by the Archdiocese and other Church authorities and by public and State authorities.

In examining the chosen sample, the Commission was specifically asked to ascertain whether there was any evidence of attempts on the part of the Archdiocese or other Church authorities or on the part of public or State authorities to obstruct, prevent or interfere with the proper investigation of such complaints. In choosing its representative sample the Commission has had specific regard to this requirement.”

To further confirm how they intended approaching their task, at para.1.7 they inform us *“This Commission’s investigation is concerned only with the institutional response to complaints, suspicions and knowledge of child sexual abuse”.*

Finally, at para. 2.14 the Commission tells us why they needed to have oral hearings..... *“The focus of these hearings was on how complaints, allegations or suspicions of child sexual abuse were handled generally by the various authorities throughout the relevant period”.*

How did the Commission approach its task?

It is clear from the above that the Murphy Commission was fully cognisant of its limited brief, both under its terms of reference and the statutory framework.

However, as one examines the Report one finds a surprisingly different tone, approach and outcome. For rather than being concerned *“only with the institutional response”*, if one examines the conclusion of each section in Part 2 (which deals with the known history of each of the 46 priests in the representative sample), one finds **“The Commission’s Assessment”** followed by a critique, usually in stinging terms, of the role played by individual clerics in the Church’s handling of that particular case.

These “assessments” were then used in Part 1 Chapter One, **“The Overview”** to literally summarise the evidence against each cleric. This Overview became the focus of much of the subsequent extensive media attention.

A good indicator of how the Commission actually undertook its task during this investigation can be read between the lines of the following sample passages in their Report:

Para. 1.54: “was the only (cleric) to unequivocally admit in evidence to the Commission that he may not have handled matters satisfactorily”.

Para. 1.59: “The Commission noted that, apart from (one individual) there was a disturbing failure to accept responsibility on the part of some of the bishops who gave evidence”.

Para.1.91: “Institutions and individuals, no matter how august, should never be considered to be immune from criticism or from external oversight of their actions. In particular, no institution or individual should be allowed such a pre-eminent status that the State, in effect, is stymied in taking action against it or them **should there be breaches of the States laws.**”

(Emphasis added. Its important to bear in mind that no breach of State laws was in fact alleged against those clerics who gave evidence)

The Commission makes no bones about what it is doing. That section of its Report which introduces the clerical personnel they are about to assess (at para.1.36) is entitled **“Individual Archbishops and bishops”** followed by damning assessments such as

“he dealt particularly badly with complaints”and..... “he also dealt badly with a number of complaints”.

At para.1.89 one even finds the Commission grading individual clerics on their ability/inability to make and keep contemporaneous notes from 30 or 40 years ago!

So, in addition to“ investigating and reporting” on those matters tasked in their mandate we have a Commission which gave the impression to clerical participants that it was also concerned with making a “case” against them personally.

By what authority has the Murphy Commission used the procedures of the 2004 Act to investigate individual wrongdoing? I can find no mention whatever in their terms of reference to, for example, “and the Commission shall assess the quality of the response of each bishop to such complaints and allegations” or such wording as might have expanded the mandate of the Commission.

To illustrate the reputational damage that actually occurred as a result of this approach one only has to cast one’s mind back to the publication of the Murphy Report in November 2009. The media focus generally did little to highlight the many fine recommendations that were contained in the Report, rather there was a concentration on highlighting those clerics whom the Commission had singled out for naming and shaming. Indeed, it became clear that to be even **“named”** in such a Report was sufficient to be regarded as socially undesirable.

If I am wrong on this point and a Commission *has* inherent powers to broaden its mandate as it sees fit and without notice to affected parties, ***if indeed it came to see its mission as assessors of blame to individual clerics for that institutional failure***, it was under an obligation to warn those clerics taking part in their Investigation where it was heading and to give each of them a fair and balanced hearing before coming to any such conclusions. It goes without saying that to be publicly condemned by this Commission as

someone in authority who could have prevented further instances of child sexual abuse yet knowingly turned a blind eye to same was always likely to bring a lifetime's work down in shame and ignominy.

Were the Catholic clerics mere witnesses before the Commission?

In theory they were witnesses but it seems, to this reader at any rate, from the very tone and content of its Report that the Commission had embarked on an adversarial approach towards those clerics who were still alive from the period under review and available to testify (when allowed). The conduct of individual clerics, none of whom were under suspicion of child sexual abuse, had become the focus of the Commission's investigation.

Under Article 40 (3) of the Irish Constitution the State guarantees to vindicate the good name of every citizen. In the case of *In re Haughey* (1971) IR 217, Chief Justice O'Dalaigh, with reference to the Committee of Public Accounts of Dáil Éireann, found :

“Mr.Haughey is more than a mere witness. The true analogy, in terms of High Court procedure, is not that of a witness but of a party. Mr.Haughey's conduct is the very subject matter of the Committee's examination and is to be the subject matter of the Committee's Report.”

And the Chief Justice continued....

“ In proceedings before any Tribunal where a party to the proceedings is at risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may correctly be classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights”.

Four “minimum rights”

The learned Chief Justice then went on to list the **four minimum rights** under which such a witness or party should be:

- “i) Furnished with a copy of the evidence that reflects upon his good name,*
- ii) Be allowed to cross-examine his accuser via counsel,*
- iii) Be allowed to give rebutting evidence, and*
- iv) Be allowed to address the Committee in his defence by counsel”.*

How are such minimum rights protected in the Commissions of Investigation Act 2004?

- 1) *Furnished with a copy of the evidence that reflects upon his good name.*
The **right to advance notice of allegations** and criticisms levelled against an individual or body may be said to be one of the most basic rights identified in *In Re Haughey*.

Yet Sections 11 and 12 of the 2004 Act render this right as meaningless and ineffectual. In summary, they provide that were I to be summoned to appear before a Commission, and,

.....where the Commission has already received evidence **in private** from a witness that concerns me it shall disclose the **substance** of that evidence which, **in its opinion**, I should be aware of before I myself give evidence before the Commission. However, whether or not I will be told the **source** of that evidence is at the discretion of the Commission. Further, I will be afforded **an opportunity** to comment on that evidence by written or oral submissions. However, my lawyer will only be allowed to cross-examine that witness **at the discretion of** the Commission. (Emphasis added)

How can I prepare to properly address an accusation when I do not know its full content or context, let alone the identity of my accuser? What if the Commission neglects to inform me of a damaging accusation, does that accusation then go forward to appear without contradiction in their final Report? Such an appalling vista need not arise solely through neglect because the Commission (not knowing my evidence in advance), may not realize that some evidence that they already possess “concerns” me so they will not have disclosed same to me by the time I come to give evidence.

Putting it another way, because the Commission is given complete discretion with regard to disclosure then, by definition, an individual before the Commission may not even know of the existence of undisclosed information so that there can be no “opportunity” to comment on that evidence.

It would, in my opinion, require a great deal of ingenuity to devise a more unfair system of evidence gathering.

In the case of “Joseph Murphy Structural Engineers-V- The Flood Tribunal (21/04/2010) the Supreme Court held that:

“anyone exposed to the risk of adverse findings based on an accusation of criminal conduct should receive reasonable advance notice of the evidence to be presented”.

As stated, there was no accusation of actual criminal conduct against the clerics who appeared before the Murphy Commission because at the period under investigation, i.e. 1975 to 2004, there was no legal obligation on a citizen to prevent someone else committing a crime.

However, by the time the Commission had commenced its work that scenario had changed utterly. The Criminal Justice Act (2006) made it a serious offence for anyone who “intentionally or recklessly endangers a child by:

Causing or permitting them to be exposed to child sexual abuse, or by failing to take reasonable steps to prevent (that) child sexual abuse”.

Although this Act was obviously not retrospective, it should have been obvious that, whatever the legal position, any adverse findings on such a sensitive issue would cause grave reputational damage against an authority figure such as a cleric of the Catholic Church.

In the case of *Maguire –V- Ardagh* (2002) 1 IR 385 Mr. Justice Hardiman found that the Constitutional right to protection of one’s good name required, at a minimum, the four “*In re: Haughey*” rights referred to above and that such rights were analogous to those of a Defendant in a criminal trial.

2) *Be allowed to cross-examine his accuser via counsel .*

The **right to cross-examine via counsel** was re-iterated by Hardiman J. in the same case in the following passage:

“Cross-examination adds considerably to the length of time which proceedings will take. But it is an essential, constitutionally guaranteed, right which has been the means of vindication of innocent people.....it must be firmly understood that, when a body decides to deal with matters as serious as those in question here, it cannot (apart from anything else) deny to persons whose reputations and livelihoods are thus brought into issue, the full power to cross-examine fully, as a matter of right and without unreasonable hindrances. This, of course, is not to deny to any tribunal the right to control prolixity or incompetence if that is manifested”.

3) *Be allowed to give rebutting evidence.*

How does one decide whether or not **to call evidence in rebuttal** of evidence that is already before a Commission if one is not aware of its full content, context or source? And of course if the Commission has not realized that that particular piece of evidence “concerns” me before I have testified, I will not in fact be able to call evidence in rebuttal. Further, I can find no provision in the 2004 Act that allows a person whose reputation is at stake to call a witness in rebuttal.

4) *Be allowed to address the Committee in his defence by counsel.*

The **right to address the Commission via counsel** follows on from the right to cross-examine. Such a right acknowledges the fact that “equality of arms” under Article 6 of the European Convention on Human Rights, works from the premise that:

“Everyone who is a party to proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him under a substantial disadvantage vis-à-vis his opponent”, see Kaufman –V- Belgium (9th December 1986) D.R. 50.

There is no provision in the 2004 Act for counsel or indeed a lay litigant to address the Commission at any stage. The nearest one gets to such a fundamental right is to be found in Sections 34 and 35 which provide, in summary and with my additional words in parenthesis:

- a) That before submitting its Report to the Minister the Commission shall send the relevant part of its draft report to any person identified therein, and,
- b) A person receiving such a draft who believes that fair procedures have not been observed can *either*:
 - i. make a written submission to that effect to the Commission (**and hope**) that they will make the required amendments, *or*
 - ai. apply to the High Court for an order directing the Commission to amend its Report.

Once they have received your submission the Commission may take one of three steps:

- i) amend the report,
- ii) apply to the Court for directions, *or*
- iii) decide not to make any amendments.

However, on my reading of *section 35* the two choices available under (b) above are mutually exclusive for any witness concerned about his or her reputation. So, does one take a chance that the Commission will respond effectively, knowing that one then has no avenue of appeal if they make no amendment?

Or does one rush straight to the High Court with all of its discouraging potential for a ruinous costs order?

To summarise:

The fundamental right to address a Commission which is investigating one’s past behaviour via counsel has been transferred to a right to go to the High Court where the judge will be a total stranger to the proceedings.

Further, Section 11 of the 2004 Act makes it very difficult for any lawyer to properly represent his/her client as it provides that:

Investigations, including oral testimony shall be in private, unless otherwise directed by the Commission.

The Commission will give directions as to who can be present.

Lawyers for other parties may only be present if the Commission directs that it would be in the interests of “fair procedures”; and,

Cross-examination of a witness will be entirely at the discretion of the Commission.

Clearly no lawyer could possibly do full justice to their client’s case with one, if not both hands tied behind their back. But of course none of this should unduly worry a participant in a Commission of Investigation if they could be sure that such a Commission not only derived its authority from terms of reference that complied with the spirit and intent of the 2004 Act but also that it would keep itself within those terms of reference.

Chapter 3

Examining the Murphy Report:

Secrecy provisions

The Report:

Points for Consideration:

The Defence

The “Learning Curve”

Clash of Cultures

Dealing with the evidence

Differences in treatment of witnesses

Broad brush approach

I will now examine how the Murphy Commission dealt with the issues of balance and fairness to those clerics who appeared before it as witnesses.

My concern here is to examine the workings of the Commission in a strictly legal sense, to see how it fulfilled its mandate and to what extent it did justice between all of the parties whom it investigated. In making this assessment I will stay within the evidence before the Commission, as set out in its Report, on the assumption that all relevant facts that gave rise to any particular findings made by the Commission have been disclosed in that Report. My comments on evidence have been heavily constrained by the “secrecy provisions” contained in the 2004 Act.

I have also ignored Canon Law as I do not know enough about the subject to pass comment.

The effect of the secrecy provisions of the 2004 Act:

Section 11 (3-5) provides for evidence to be taken in conditions of privacy and secrecy:

*“a person (including a member of the Commission) shall not disclose or publish any evidence given or the contents of any document produced by a witness while giving evidence in private, except –
as directed by a Court,
to the extent necessary for the purposes of section 12, (the duty to disclose substance of evidence to other witnesses)
if necessary in the interests of fair procedures and then only with the written consent of the chairperson, or
to a tribunal in accordance with section 45.(Commissions documents and evidence to be available to Tribunals)
A person who breaches this subsection shall be guilty of an offence”.*

And **Section 37** which provides for the confidentiality of draft reports:

*“ A person who receives a draft of a report or part of a report from a Commission under section 34 shall not disclose its contents or divulge in any way that a draft or part of a draft has been sent to that person, except-
With the prior written consent of the Commission, or
To the extent necessary for the purposes of an application to the Court.
A person who contravenes subsection (1) shall be guilty of an offence.”*

Section 50 provides that any person charged with an offence against sections 11 or 37 and who is

“convicted on indictment shall be liable to a fine of €300,000 or imprisonment for a term not exceeding 5 years, or both”.

Although obviously designed to allow witnesses to testify on delicate personal matters without fear of publication, these sections of the 2004 Act have had a (presumably unintended) chilling effect on anyone who wishes to comment on the workings of this particular piece of legislation. It is now clear that if a person is summoned to appear before a Commission of Investigation they will not only be at risk of being denied fair procedures but they are forbidden to comment on the content of the workings of the Commission. I believe this has to be yet another reason for confining the work of such Commissions to the investigation of institutional rather than individual failure.

The Report

The Murphy Commission has undoubtedly made strenuous efforts to gather together as much material as possible to enable it to give us a comprehensive survey of how the Catholic Church and various State bodies co-operated (or, more often, failed to co-operate) with each other on the particular issue of clerical child sexual abuse in the Dublin Archdiocese over the period 1975 to 2004.

In this work they were not helped by the fact that the State authorities with which they were dealing often made no written record of complaints of child sexual abuse, did not preserve such records as were made, and/ or had no systematic method of retrieving old records. It transpired that the largest volume of documentary material the Commission received (over 70,000 documents) was from the Archdiocese of Dublin.

Working against a tight time frame, the Commission was investigating a very difficult subject replete with harrowing accounts of childhood sexual abuse perpetrated by men whom they and their parents trusted because of their unique position in society. It was a mammoth task just to gather up the material, let alone sift through it to seek the full picture. I suspect it must be very trying to keep one's focus during an investigation that hears different strands of evidence, not in chronological order, but in order of the availability of witnesses. There would necessarily be long delays whilst writing to and awaiting responses from those persons "concerned" by that evidence. The Commission still managed to produce a very comprehensive Report in just over 3 years that will undoubtedly serve as a template for those Church and State authorities concerned with putting in place appropriate procedures to protect vulnerable children in future.

But could the operation of the Murphy Commission usefully serve as a template for how to conduct a Commission of Investigation?

(This is not to say that the Murphy Commission solely concerned itself with how each relevant cleric of the Archdiocese had dealt with reports of clerical child sexual abuse that had come to their attention, far from it, but I have set out below how the Commission appeared to concentrate its spotlight on the clergy to an extent that I believe, cannot have been anticipated by their terms of reference or statutory framework.).

POINTS FOR CONSIDERATION

1) THE TREATMENT OF THE "DEFENCE".

- a. Generally speaking, in its Report the Commission refers to such arguments/submissions as were made by the clergy and or their lawyers only in order to try to dismantle them. The Commission sets out its stall in the very first chapter of the Report, Chapter 1.... **"Overview"**. Here, in paragraphs 1.14 to 1:35, covering just over seven pages, the Commission takes a brief run

through all of the excuses, explanations and mitigating circumstances raised before them by the clergy (in effect, their “Defence” to the allegations of neglect and cover-up of child sexual abuse by other members of the clergy) before summarily dismissing them all out of hand.

In considering the question of balance it is instructive to record that the Commission’s Report, consisting of 2 parts, runs in total to over 800 pages, of which remarkably, the “Defence case” of the clergy is disposed of in just 7 pages in chapter 1 of Part 1. The Report then moves to summary assessments of each individual cleric.

On my reading of the Report it appears that no attempt was made to consider the circumstances facing each individual cleric at the particular time a complaint was made. Certainly no such analysis appears in the Report. This sweeping “broad brush” approach would be perfectly understandable if the Commission was solely considering institutional failure in the Church but it seems to me that once the Commission decided to “name, blame and shame” individual clerics it had an obligation to allow them (those that are still alive) an opportunity to have their individual cases presented and considered as fully and fairly as possible if they were at risk of being exposed to public opprobrium.

- b. Insofar as the Commission made no effort to fully set out and properly evaluate the case for the Defence in its Report it was running against accepted judicial/tribunal practice. Even if the Commission had only to satisfy the civil standard of proof, i.e. "on the balance of probabilities" it was still obliged in my view to balance the evidence before coming to any conclusions that would result in serious reputational damage to individuals. Indeed, the case law shows that the standard of proof should have been at an even higher level to reflect that risk of reputational damage.
- c. The whole tone of the report has the appearance of being highly critical, dismissive and occasionally sarcastic towards many points made by the Defence. In relation to the evidence given by many of the clergy, the Report never gave them the benefit of any of the doubts that one would normally expect when one is assessing poorly documented events from 20 or 30 years ago. By contrast, the Commission is quick to criticise those clerics, even where the evidence is poorly documented or can be read in several different ways.
- d. Having examined some of the files of clerical witnesses I found that many of the clerics who testified before the Commission had had a similar experience insofar as few, if any, of the points made in their evidence or on affidavit, or the submissions made on their behalf by lawyers were fully addressed by the Commission. In a normal civil trial all reasonable submissions by each side should be considered and accepted or rejected, for stated reasons, before a

verdict is reached. Indeed the Commission has made little effort “*to include comments on, or even disagreements with their conclusions by affected parties, so that each side of the argument is recorded*” as recommended by the LRC consultation paper.

In one particular instance, as set out by the Commission in Part 2, Chap.35 of its Report, they appear to have confused the roles played by two individuals concerning which of them first had knowledge of the grave admissions made by a paedophile priest before he was appointed chaplain to a hospital where he would have access to unaccompanied children. Although this apparent confusion had been brought to the attention of the Commission by the solicitors for one of the clerics in correspondence prior to publication, their submission (which appeared very reasonable to me) was not only ignored in the Commission’s findings but was not even referenced in their Report.

2) THE LEARNING CURVE:

- a. One would have expected such a wide-ranging investigation into a controversial period of our recent history to begin its Report by setting out the historical and sociological context in which CSA by clerics took place in the period under review. However, it would seem that no attempt was made to put these matters into the context of their times. In fairness, this was not essential as long as the Commission had borne in mind all of the benefits of hindsight when assessing behaviour that mostly took place 20 to 30 years ago.
- b. In their eagerness to censure individual clerics the Report can be said to have looked at the events of 20, 30 years ago through the prism of today's glasses. I can find no acknowledgement of the benefits of hindsight or contemporary knowledge. For instance, our current state of knowledge of paedophilia is far greater than what was generally understood a generation ago. Similarly, the long term psychological damage that can result from child sexual abuse of children was not so widely known 20 or 30 years ago.

For an insight into attitudes of that period I would refer to a letter published on 7th December 2009 in “The Irish Times” during the controversy generated by publication of the Murphy Report by a Dr.Niall O’Donohoe. His subject was "The Sexual Abuse of Children". He recalled a lecture given in Dublin by the renowned paediatrician, Prof. Neil O’Doherty in 1980:

“In the early 1970s, he had published a book entitled “The Battered Child”, dealing with the physical abuse of children. This was well received internationally. Sadly his lecture in 1980 was received in total silence by the professional audience, and several people left during it.

There was no applause at the end and subsequently he was reviled for presenting such a communication in Ireland where such abuses did not happen”.

- c. The Commission rejects the "Learning Curve" theory out of hand insofar as any cleric is concerned, presuming them all to have been gifted with knowledge and insights that were not available to society in general and to have been experts in Child Sexual Abuse issues 30 years ago.

Report 1.14: *“Officials of the Archdiocese of Dublin and other Church authorities have repeatedly claimed to have been, prior to the late 1990s, on “a learning curve” in relation to the matter. Having completed its investigation, the Commission does not accept the truth of such claims and assertions.”*

Clearly the catholic clergy would have had some knowledge of the effects of csa, although it appears to have been as inadequate as that of civil society in general.

- d. At Chap 1.19, (having taken to task at 1.14 a church source who referred to “a tsunami” of revelations of CSA in the clergy) the Commission states ...

“The claim that bishops and senior church officials were ‘on a learning curve’ about CSA rings hollow when it is clear that cases were dealt with by Archbishop McQuaid in the 1950’s and 1960’s”.....the Commission then goes on [1.19] to give the statistics for the cases it examined in the Dublin Archdiocese as follows:

In the 2 decades of 1960-1979..... .

14 complaints of CSA and 2 suspicions/concerns raised.

In the 2 decades that followed.....

199 complaints of CSA and 47 suspicions/concerns raised.

Those figures, reflecting a 13-fold increase, certainly look like “a tsunami” to this reader. But, even assuming that the Archbishop personally dealt with all 14 cases over those first 20 years, how does one impute all of the knowledge he gleaned therefrom to all of the bishops of the diocese that followed after him? Did he regularly brief them on this topic? Not on the evidence before the Commission. *“The problem as a whole never seems to have been discussed openly by the Archbishop and his auxiliaries, at least until the 1990s.”* [Report 1.31].

This sweeping “broad brush” approach to gathering evidence and making assumptions was bound to and I believe, has in fact given rise to questionable findings by the Murphy Commission.

- e. By way of contrast, many of the lay witnesses that the Commission quotes with approval in the Report point out how little they knew of child sexual abuse 30 years ago. Further, within the Report one finds that all of the other authorities under investigation had been on their own learning curve. For

example, An Garda, Social Workers, Department of Health, Psychologists, and other Professionals:

i. An Garda:

At Para 5.4 we find that..... *“It is apparent, from many of the complaints received by the Commission, that historically a single Garda often conducted the entire investigation”* into an allegation of CSA (Child Sexual Abuse). As knowledge of the issue grew through media and Court reports in the 1990s the Gardaí beefed up their investigation units into this offence and streamlined their co-operation with other relevant bodies so that at Chap 5.13 one also reads in relation to allegations generally of clerical CSA *“The first formal structured and non-case specific contact between the Archdiocese and An Garda Síochána was in 1995”*.

At Para. 5.58 the Commission commented on a 2006 Supreme Court decision in *H–V- DPP (2000) IESC 55*..... *“the Supreme Court reviewed the extensive case law which had evolved since the mid-1990s around the issue of delay by complainants in reporting child sexual abuse to the Gardai. In reaching its decision the court recognised developments in the 1990’s which reflected **changes in society**. The issue of child sexual abuse was discussed widely and openly for the first time”*.

ii. Social Workers:

At Para.6.53.....*“Social Workers told the Commission that awareness and knowledge of csa did not emerge in Ireland until about the early 1980’s. The HSE told the Commission that in the mid 1970’s there was no public, professional or government perception either in Ireland or internationally that child sexual abuse constituted a societal problem or was a major risk to children”*.

iii. Department of Health:

The Report sets out, at Paras.6.69 to 6.71, the contemporary Guidelines issued to social workers by the Department of Health on how to identify and manage non-accidental injury to children. In summary, neither the 1977 or the 1980 guidelines made any reference to child sexual abuse. When revised guidelines were issued in 1983, they included one brief reference to CSA but no elaboration on the issue. It was not until 1987, when a further revised version was issued, that the department’s official guidelines included a substantial section dealing specifically with child sexual abuse.

iv. Psychologists:

In reporting on “The education and formation of priests” at Para. 10.19..... *“The Commission has concluded, on the basis of its investigations, that in the years 1970-1995, there was no structured*

training on matters concerning child sexual abuse by priests or others. It is not apparent that the issue of child sexual abuse was a matter within the contemplation of psychological assessors at that time” (who were assessing candidates for the priesthood in the seminaries).

Contrary perhaps to the hindsight displayed by the Commission, little was then known of the long-term psychological damage caused to children by CSA or the manipulative, grooming and recidivist nature of the perpetrator and it was believed by the clergy that this was a mental health issue that could be "cured" by a psychiatrist.

When someone says they did not know how to deal with the issue adequately back then perhaps they are telling the truth?

v. Various professionals:

The absence of historical context in a Report tasked to *inter alia*, investigate the history of how certain events were dealt with in an earlier generation is surprising. Again, a correspondent to “The Irish Times” puts the issue more eloquently than I could. In a letter to the editor of the 12th December 2009 a Dr.GP Lewis wrote that he was not asserting that serious mistakes were not made by Church authorities which have had appalling effects for the lives of those who were abused but he claimed that they were ‘made in the context of the time’. He continued:

“Less than 20 years ago most educated people had never heard the word paedophilia. As far as I am aware, professional and statutory bodies did not know how to deal with the problems as they arose. The judiciary would give out suspended sentences with a warning to offenders. The social services and Gardaí would often ignore information given to them of allegations in their area. They were extremely hesitant to intrude into the privacy of a family where such abuse might be happening. The psychological/psychiatric professions sent offenders on treatment programmes and would often certify such people back to their location, or ministry in the case of priests, not realizing that a very high percentage reoffended.....it was only about 15 years ago, when survivors felt free to tell their stories and be heard in the process, that it finally dawned on society--and not just the Church--how appalling a crime sexual abuse is and the great damage it does. Of course, one can say that the leaders of the Catholic Church should have known better, but in the context of the time they unfortunately did not. They failed—as other professions—likewise failed”.

vi. Law Students:

In its introductory comments where they set out to prove knowledge

of clerical child sexual abuse amongst the clergy at all material times (I'm afraid I can use no other terms to describe the adversarial attitude displayed by the Commission in its own Report) one of the arguments put forward by the Commission, at Cap 1.23, was to dismiss the "learning curve" argument in respect of those bishops who were qualified barristers. They drew attention to the fact that some of the clerics had studied at the Kings Inns and the clear implication we are invited to draw is that that particular experience must have made such students very aware of the dangers of paedophilia, so *"this makes their claims of ignorance very difficult to accept"*.

However, the fact that one was well educated, and even has a degree in Canon law or Civil Law, does not mean that one knew much about the subject of paedophilia. In reality, anyone who studied law as I did in an Irish University and at the King's Inns during the 1960's and 1970's would have learnt nothing whatsoever of paedophilia, which was never discussed.

Further, this assertion that students of the Kings Inns in the 1970's must have learnt about paedophilia was never put to the clerical witnesses when they gave evidence.

To prove such a sweeping statement that they intended to rely upon, the Commission should have called or produced empirical evidence by citing references to text books and journals used by students of either Canon Law or Civil Law in the 1960's and 1970's where paedophilia was dealt with in a competent way. It is unusual for a quasi-judicial body to so casually make an important assertion that is without any evidential foundation.

3) "A CLASH OF CULTURES"

The Report fails to give any serious consideration to what I shall call the *"clash of cultures"*, i.e. a Commission in what has become a largely secular society armed with all of the benefits of hindsight and our accumulated knowledge of paedophilia, was often assessing the attitudes and behaviour of a cleric 20 or 30 years ago, long before the "Framework Document", etc. were devised. That cleric, by the very nature of his calling, his training and his profession, saw this issue in the traditional way as one of sin, confession, redemption, and if possible, forgiveness of the perpetrator. In the case of some of the auxiliary bishops who came in for particular criticism in the Report, the Commission accepted that they had been given a pastoral role when appointed to that post by their Archbishop with special responsibility for looking after younger priests and acting as a link between them and their bishops.

4) THE RECEIVING OF EVIDENCE FROM WITNESSES

It is also noticeable that whenever the Commission had a choice of whether to believe a cleric's version/memory of events or its own theory, it always chooses to follow its own theory. For instance (and hoping that I'm not trespassing onto actual evidence) I can say that in one passage of their Report, at Chap. 24.11 to 24.31 the Commission sets out to resolve a difference of recollection between a cleric and a psychiatrist about whether or not the cleric gave the psychiatrist all relevant details at an oral briefing about a priest who was to be sent for treatment, 30 years ago. The psychiatrist told the Commission that he had destroyed all of his clinical notes and records upon retirement a year before giving evidence so we know that he was not working off contemporaneous notes.

One would normally expect any forum that is exercising a quasi-judicial function to tread very warily before coming down one way or another on the credibility of undocumented recollections from 30 years ago, especially without the benefit of cross-examination. However the Commission had no difficulty in making up its mind, finding that it was "*clear*" [24.13, 24.24, 24.36] and it was "*obvious*" [24.24, 24.25] to them that the psychiatrist was correct in his recollection. This finding on creditability appears to have been plucked out of thin air as there is no evidential basis for it set out in the Report. Further, it is well-settled in our law that where an adverse finding involves discounting contrary evidence supporting a claim, the reasons for that rejection should be stated unless it would be "self-evidentially perverse" to do otherwise, which certainly does not apply here.

The Commission allowed a psychiatrist to testify (without comment from them) that he was often examining priests sent to him by the bishops with insufficient background information or no information at all, and that sometimes he did not know why a priest had been sent to him. This begs the obvious question..... "why did you not seek that information, for how can you treat people without any knowledge of why they have been sent to you?" But it seems that that particular question was not put to the psychiatrist by the Commission.

Further, at Para.24.19 "Professor was asked what was the purpose of the psychiatric assessments (which he was being paid to undertake at that time)? He replied:

"It's a good question. I mean, you'd have to really ask the Church or its representatives. I mean, I think at the time there was a sense that perhaps they were mentally disturbed and this is why they were behaving that way. That isn't so in fact. The explanation for paedophilia is not a psychiatric one. It may be a factor but only a factor".

The Commission commented “*effectively, he said that the Church put too much faith in psychiatry.*”

Beyond that, the Commission makes no comment on the professor’s evidence. It is surprising to this reader that he was not asked.....if he believed at that time that paedophilia was not amenable to psychiatry did he so inform the Church and why did he keep taking on their priests as patients if that’s what he believed at that time?

Or, was he yet another beneficiary of the learning curve?

5) HAS THE COMMISSION BEEN EVEN-HANDED IN ITS APPROACH TO REPORTING THE EVIDENCE OF WITNESSES?

In recounting its detailed investigation into the cases of 46 priests of the Dublin diocese during the period under review the Commission often had cause to criticise State authorities such as the Gardaí, the Health Boards, the office of the D.P.P. or the Granada Institute, usually for failure to pass on information or alert other authorities to their knowledge of particular paedophile priests:

a. GARDA: at Para. 17.46 “*However the Garda handling of the 1995 complaint was most unsatisfactory. The prosecution of the investigation was haphazard and desultory,*” etc. etc.

At Para. 20.174.....”*Between 1988 and 2003 not a single inquiry had been made by the Gardaí in relation to this matter. In the Commission’s view, it is difficult not to conclude that the renewed interest in the complaint in 2003 was prompted more by a fear of public opprobrium than by any realistic prospect of successfully concluding the investigation*”.

At Para.20.179..... “*The connivance by the Gardaí in effectively stifling one complaint and failing to investigate another, and in allowing Fr Septimus to leave the country is shocking. It is noteworthy that the Commission would not have been aware of the Garda activity in question were it not for the information contained in the Church files*”

At Para.27.45..... “*Two different explanations were offered by Gardaí in 2006 as to why the file in the 1997 complaint was not sent to the DPP much earlier. One explanation was that the decision was deferred pending the outcome of investigations into other complaints. Another explanation was that Fr. Septimus had never been interviewed about the complaint*”.

Clearly the Commission was not impressed by the input of the Gardaí into these investigations (and several others in the Report). Yet in each of these cases the Gardaí are referred to by title or rank only.

Save in the cases of Fr. Edmondus (Chap. 13) and Fr.Carney (Chap 28) there is no naming of individual Gardaí whom the Commission has found may have been in dereliction of duty.

- b. Regarding the **HEALTH BOARD**, they came in for particular criticism in the assessment of the Fr Edmondus case, at Chap.13.83, *“The Health Board’s promises to act and subsequent failure to do so in relation to the Edenmore concerns are worrying.It is extraordinary that the health board did find the will and the capacity to act, and act at the highest level, when the Prime Time programme began to enquire about the matter”*.

The Health Board was also criticised in relation to several other case but again, no individual was singled out for condemnation, e.g.

At Paras. 28.143 to 28.146.....the Commission expresses.....

“serious concern that they allowed children to stay with him without ensuring that there were appropriate arrangements for their supervision”; and....

“There does not seem to have been any shared knowledge in the health boards about perpetrators”; and.....

“It is surprising to the Commission that no attempts were made to contact other residents in the children’s homes in which these two complainants had lived.”

- c. **The DPP’s OFFICE:** At Para. 20.110 the DPP’s office is taken to task for some sloppy work.....

“The DPP,s office does not appear to have adverted in any way to the information given to them in the brief letter from the superintendent, which suggested that Fr.-----had a previous history of this type of offence. This was a very brief file and one might have expected that further investigation or information would have been sought from the Gardaí as to this man’s previous history”.

- d. **Granada Institute:** At Paras. 37.45 to 37.51 the Granada Institute is taken to task for producing a “seriously deficient” [37.45] report, and..... *“The Commission is very concerned that the assessment carried out in the Granada Institute in 2001 did not take account of the full facts. The conclusions reached may be justified but, on its face, the assessment is at best questionable”*[37.51].

It is remarkable that in **almost all** of the above examples the Commission has taken a merciful approach towards those other public or State authorities who have failed vulnerable children, by not naming names or singling out individuals for special attention in their Report. They have quite properly however, highlighted the institutional failures. By way of contrast and for reasons best known to themselves, when dealing with the Church authorities the Commission takes a markedly different approach by straying well beyond its original remit in seeking to apportion blame to individual clerics in almost every single case.

6. BROAD BRUSH APPROACH

7.

Finally, to return to the **“broad brush” approach to fact-finding**, the Commission seems to be making a particular point in the first chapter (1.24) of its Report with the following widely reported passage that could, however, be read in two entirely different ways:

8.

“Some priests were aware that particular instances of abuse had occurred. A few were courageous and brought complaints to the attention of their superiors. The vast majority simply chose to turn a blind eye”.

A careful reading shows us that this “vast majority” is a majority of that vague, unspecified cohort, “some priests who were aware”.

However, it too easy, in my view, to take a different impression from such a loaded passage and indeed, in the rush by journalists into print after the publication of the Murphy Report, this passage had morphed into the shorthand media impression, also heard on other media, that the Murphy Commission had found that the vast majority of priests in the Dublin diocese were in fact aware of instances of child sexual abuse, but they simply chose to turn a blind eye.

It is surprising that such unfortunate wording survived the editorial process that must have gone into the preparation of the Murphy Commission’s final Report.

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4: Conclusions

- 4.1 The Public must be constantly reminded that the aim of a tribunal/commission is not to establish guilt or innocence.
- 4.2 The function of a tribunal/commission is to enquire into the facts and to draw conclusions which are justified by the evidence, with a commission having a more limited brief than a tribunal. It is essential for the administration of justice and the protection of the good name of the citizen that a commission in discharging this function should not make findings which are not only beyond its terms of reference but beyond the expectation of participants in that investigation.
- 4.3 Writing for “The Bar Review” on the subject of “*Tribunals and The Erosion of The Right to Privacy*”, in July 1999 our former Attorney-General, Paul Gallagher SC, made the general but entirely apposite comment:

“In the history of the State some of the most important constitutional rights have been established and vindicated in cases where the plaintiffs seeking to establish those rights have been wholly unmeritorious. While the rooting out of wrongdoing is undoubtedly an essential part of democracy, it is equally an essential part of that democracy that the fundamental rights of a citizen are protected, notwithstanding public demand for results and a lack of public sympathy for the people invoking those constitutional rights. Fundamental rights are designed, at least in part, to provide protection against the emotions of the majority and against high running feelings amongst the public”.

- 4.4 The Law Reform Commission consultation paper had emphasised the importance of procedural fairness at par. 7.03 of its report:

“Because inquiries do not determine rights, it is not possible for a person who is under investigation to point to the direct consequences for him of a decision of the inquiry in order to attain procedural protection. However, although inquiries do not determine rights, they certainly have the potential to affect rights. In most cases the right affected by the proceedings and report of an inquiry is the right to good name or to reputation, which is protected by Article 40.3.2 of the Constitution. Examples are legion. The right to privacy or confidentiality may also be affected, as may other rights. In the context of an inquiry procedural fairness is the main means by which these rights receive protection”.

- 4.5 Chief Justice Hamilton stated clearly in the leading case on this topic... “*The Court is entitled to assume that a Tribunal of inquiry will conduct its inquiry as it is obliged to do, in accordance with the principles of constitutional justice and in particular with regard to fair procedures.*” (Haughey –V- Moriarty, 1999 3 I.R.1 at p.41.)
- 4.6 The Commissions of Investigation Act 2004 was specifically designed to circumvent these constitutional hurdles and to allow for a limited brief to establish the facts behind institutional failure so that hopefully, lessons would be learnt for the future. But bearing in mind its inbuilt failings, I would submit that it is vital that any Commission using the 2004 Act remains impartial and endeavours to tell the full story.
- 4.7 The State was entirely justified in deciding to investigate historical child abuse which involved priests and religious. These are clearly matters of serious public concern and it is right that the State should enquire about how they happened and how they were dealt with in the past.
- 4.8 However, individual clerics of the Dublin Archdiocese should not have been “under investigation” if the Murphy Commission had stayed true to its terms of reference. But for reasons best known to itself the Commission veered off the tight rails imposed by the 2004 Commissions of Investigation Act and wandered into an adversarial arena that concentrated, to an alarming degree, on “naming and shaming” those clerics whom the Commission found wanting in child protection at that time.
- 4.9 Leaving aside the question of it having acted *ultra vires*, once the Murphy Commission began to focus its scrutiny on individual blame the catholic clergy who answered their summons were as entitled as any other Irish citizen to natural justice and vindication of their good name and reputation.
- 4.10 Today, with the benefit of hindsight, the response of the Catholic Church as an institution to allegations of child sexual abuse against their own priests can be seen to have been self-serving, hypocritical, cold and uncaring for the children concerned.
- 4.11 But does that mean that each of the clerics who appeared before the Murphy Commission and is “named” in their Report was guilty of those faults and so was wholly unmeritorious? I have no idea. I have not been able to get a fair reading of *their* case because the Murphy Report lacks nuance, balance and any understanding of the historical and sociological context in which these events took place. Further, the very nature of the Commission of Investigations Act 2004 precluded fair procedures to those clerics who were called to account for themselves.
- 4.12 One thing is now clear; the sort of fact-finding investigation envisaged by the Commissions of Investigations Act 2004 could readily be entrusted to different categories of competent professionals. Indeed, experience in the Murphy Commission shows it should not be lawyer-driven because lawyers are by instinct adversarial, always needing to be on one side or the other, to have winners and losers.

- 4.13 The Murphy Commission has made a valuable contribution to our understanding of how allegations of child sexual abuse by priests and religious were dealt with (or ignored) by the relevant Church and State agencies in the recent past. The story it tells and the recommendations it makes will hopefully have served as a useful template for proper management of all forms of child sexual abuse from its date of publication.
- 4.14 However, from the legal perspective it is difficult to avoid the conclusion that insofar as the Catholic clerics who were called to testify were concerned, the practices and procedures of the Murphy Commission fell far short of meeting the concerns of the Law Reform Commission and, more importantly, of natural and Constitutional justice.

Fergal Sweeney.

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Having practiced at the Irish Bar on the civil side for 11 years, Fergal Sweeney took up an appointment as a Magistrate in the then Crown colony of Hong Kong in 1985. In 1989 he was promoted to Principal Magistrate. Subsequently in 1994 he was promoted to sit on the Hong Kong District Court where he specialised in the conduct of commercial fraud trials.

It was in one such trial that he became the first judge to make a ruling on a constitutional challenge under Hong Kong's new written Constitution, the Basic Law, introduced during its handover to China in 1997. Following a 5 day "trial within a trial" he found that evidence-gathering by way of covert surveillance via listening devices on suspects carried out by the "Independent Commission Against Corruption" under a self-administered warrant infringed the Hong Kong citizen's right to privacy of communications under the Basic Law. The Hong Kong government was thereby obliged to bring in emergency powers to provide lawful procedures (including application to a High Court judge), to be followed before such a warrant could in future be issued.

In 2005 he took early retirement to return to live and work in Ireland.